

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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5 In the Matter of:

6

7 SEARS HOLDINGS CORPORATION, et al.,

8

9 Debtor.

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13 United States Bankruptcy Court

14 300 Quarropas Street, Room 248

15 White Plains, NY 10601

16

17 January 21, 2021

18 10:09 AM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: JUSTIN WALKER

1 HEARING re Notice of Agenda of Matters Scheduled for
2 Telephonic Hearing on January 21, 2021 at 10:00 a.m.

3
4 Case Status Conference

5
6 Motion to Shorten Time (related document(s) 9130, 9131)
7 filed by David H. Wander on behalf of Pearl Global
8 Industries, Ltd. (ECF #9132)

9
10 Motion for Payment of Administrative Expenses APPLICATION OF
11 PEARL GLOBAL INDUSTRIES LTD. FOR ALLOWANCE AND PAYMENT OF
12 REASONABLE COMPENSATION, PURSUANT TO BANKRUPTCY CODE §§
13 503(b)(3)(D) AND 503(b)(4), FOR MAKING A SUBSTANTIAL
14 CONTRIBUTION IN THESE CASES. filed by David H. Wander (ECF
15 #9130)

16
17 Declaration BY DAVID H. WANDER, ESQ. IN SUPPORT OF
18 APPLICATION BY PEARL GLOBAL INDUSTRIES LTD. FOR ALLOWANCE
19 AND PAYMENT OF REASONABLE COMPENSATION, PURSUANT TO §§
20 503(b)(3)(D) AND 503(b)(4) OF THE BANKRUPTCY CODE, FOR
21 MAKING A SUBSTANTIAL CONTRIBUTION IN THESE CASES (related
22 document(s) 9130) (ECF #9131)

1 Debtors' Objection to Substantial Contribution Application
2 of Pearl Global Industries Ltd. (related document(s) 9130)
3 filed by Sunny Singh on behalf of Sears Holdings
4 Corporation. (ECF #9233)

5
6 Joinder of the Official Committee of Unsecured Creditors to
7 Debtors' Objection to Substantial Contribution Application
8 of Pearl Global Industries Ltd. (related document(s) 9233,
9 9130) filed by Philip Dublin on behalf of Official Committee
10 of Unsecured Creditors of Sears Holdings Corporation, et al.
11 (ECF #9234)

12
13 Joinder of Gary Polkowitz, Administrative Expense Claims
14 Representative to Debtors' Objection to Substantial
15 Contribution Application of Pearl Global Industries Ltd.
16 (related document(s) 9233, 9130) filed by Carly Everhardt on
17 behalf of Gary Polkowitz. (ECF #9235)

18
19 REPLY BY PEARL GLOBAL INDUSTRIES LTD. IN SUPPORT OF
20 APPLICATION FOR ALLOWANCE AND PAYMENT OF REASONABLE
21 COMPENSATION, PURSUANT TO BANKRUPTCY CODE §§ 503(b)(3)(D) AND
22 503(b)(4), FOR MAKING A SUBSTANTIAL CONTRIBUTION IN THESE
23 CASES (related document(s) 9130) filed by David H. Wander on
24 behalf of Pearl Global Industries, Ltd. (ECF #9243)

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1 Declaration Reply Wander in support of substantial
2 contribution (related document(s) 9130) filed by David H.
3 Wander on behalf of Pearl Global Industries, Ltd. (ECF
4 #9244)

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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15 BY: SUNNY SINGH (TELEPHONICALLY)

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1 P R O C E E D I N G S

2 P R O C E E D I N G S

3 THE COURT: Good morning. This is Judge Drain.
4 We're here on in re: Sears Holding Corp., et al., for our
5 regularly scheduled omnibus date. This is a completely
6 telephonic hearing. You should identify yourself and your
7 client the first time you speak. It's a good idea to do so
8 thereafter so that the court reporter and I can put together
9 your voice with your name.

10 There's one authorized recording of this hearing.
11 It's taken by Court Solutions, which provides a copy of the
12 reporting to our clerk's office on a daily basis. If you
13 want to obtain a transcript of today's hearing, you should
14 contact our clerk's office to arrange for the production of
15 one. Because these hearings or this hearing is on -- is
16 completely telephonic, you should keep your phone on mute
17 unless you're speaking, at which point you should unmute
18 yourself, of course.

19 So, with that introduction, I have the amended
20 agenda for today's hearing provided by the Debtor's counsel
21 and I'm happy to go down that agenda.

22 MR. SINGH: Thank you, Your Honor. Good morning.
23 Sunny Singh, Weil Gotshal on behalf of the Debtors. Your
24 Honor, can you hear me okay?

25 THE COURT: Yes, I can hear you fine.

1 MR. SINGH: Okay, thank you, Your Honor. Your
2 Honor, I'm joined by my partner Garrett Fail this morning.
3 As Your Honor indicated, we did file the amended agenda, and
4 the first item is really a status update on getting to an
5 effective date.

6 Your Honor, we did file this morning on the docket
7 the report that I'm about to go through and did email it to
8 chambers as well, so Your Honor had an advanced copy before
9 this morning. So, if it's okay with Your Honor, I'll kind
10 of just walk through it. And, of course, if you have
11 questions, I'm happy to answer them at any time.

12 THE COURT: That's fine. I have a copy here.

13 MR. SINGH: Okay, great. So, Your Honor, just
14 picking up or starting off on page 2 of the presentation --
15 and, actually, before I do that, I would just note, Your
16 Honor, you know, we, the Debtors, and the restructuring
17 committee sort of worked on this obviously with M3.

18 You know, we do have an administrative claims
19 representative on the Creditors Committee but these are the
20 Debtor's estimates. Not sort of -- we're not representing
21 on behalf of the administrative claims representative, for
22 example. We'll work with Mr. Polkowitz, as we've been
23 doing, and his counsel to answer any questions, etc., after,
24 but these are the Debtor's numbers and estimates, Your
25 Honor.

1 THE COURT: Okay.

2 MR. SINGH: Your Honor, in terms of progress on
3 the administrative claims reconciliation in the program on
4 page 2, to date we've reconciled almost about 4,000 claims
5 and other requests for payment, eliminating \$1.3 billion of
6 claims that were asserted and claiming entitlement to
7 administrative or priority status. And we've allowed about
8 1,700 claims, Your Honor.

9 There's still ongoing disputes with respect to
10 roughly 50 claims. 49 here asserting about \$11 million.
11 Excluding claims that -- you know, we've reconciled the
12 amounts but they have open preference issues.

13 So, Your Honor, if you look the chart below, which
14 hopefully provides a helpful summary to the Court and
15 parties, the first two lines under the Administrative
16 Consent Program deal with the opt in and non-opt out
17 creditors, the first sort of two categories. The opt-ins
18 get up to 75 percent and the non-opt outs get up to 80
19 percent of their allowed claim.

20 And if you look all the way to the right, Your
21 Honor, you see the last three rows there show the allowed
22 amount post the settlement discount, roughly \$99.3 million.
23 We've made two distributions to date of almost \$40 million,
24 leaving for that group at least \$59.5 million.

25 And then a few lines down, Your Honor, there's the

1 opt-out group, you know, the folks that have not received
2 any payments opted out, so they're entitled to a full 100
3 cents, but entitled to that when we go effective. The
4 asserted amount there, Your Honor, is 28.3 million and the
5 Debtor's estimates remain consistent with sort of what we've
6 had since the confirmation hearing at about \$25 million.
7 So, roughly \$90 million total when you take into -- some
8 disputed disclaims that are still ongoing that we think are
9 going to ultimately be allowed.

10 THE COURT: Can I -- can I interrupt you here at
11 this point?

12 MR. SINGH: Of course, Your Honor.

13 THE COURT: You referred earlier to a group of
14 claims, administrative expense claims that have -- where the
15 dollar amount has been fixed but they're subject to
16 outstanding preference issues?

17 MR. SINGH: Correct, Judge.

18 THE COURT: I guess the question I have is --
19 first, I just want to confirm, they are not in the chart
20 itself, right?

21 MR. SINGH: Well, you can see -- Your Honor, we
22 did account for them if you'd look right below the line that
23 says Total Opt-In and Allowed Non-Opt Out, it says,
24 "Reconciled claims subject to preference issues, about \$4.1
25 million." Do you see that number?

1 THE COURT: Okay. Right, I see it.

2 MR. SINGH: Yeah.

3 THE COURT: So, that's a relatively small amount.

4 MR. SINGH: Correct, Judge.

5 THE COURT: And the preference issues obviously
6 would be a setoff to the extent that there would be a
7 preference determined or a settlement.

8 MR. SINGH: That's right, Your Honor.

9 THE COURT: And the 4.1 is before that, right?
10 It's --

11 MR. SINGH: That's right.

12 THE COURT: Okay.

13 MR. SINGH: Right, that's what we've reconciled as
14 the amount on the claim. There's a preference on top of
15 that. And, you're right, Your Honor, as in most of these,
16 we sort of settled and came up with a net amount either of
17 the claim or a payment to the estate.

18 THE COURT: Okay, very well.

19 MR. SINGH: Yeah. And right below that line, Your
20 Honor, just to close it out, you can see the remaining
21 disputed claims from an asserted amount of 11.4. We believe
22 that it's going to be around \$2.8 million in terms of the
23 reconciliation and the Debtor's amount. So, we really, in
24 terms of reconciling and allowing administrative claims, are
25 in the homestretch, I would say, in terms of just claims

1 resolution.

2 THE COURT: Okay.

3 MR. SINGH: Your Honor, in terms of progress --

4 THE COURT: I'm sorry, this was -- this dollar
5 amount of total estimated allowed admins of 177 or so, do
6 you remember how that related to the estimate at the
7 confirmation hearing?

8 MR. SINGH: Yes, Your Honor, and we actually have
9 a chart on that. If you scroll down, I can go to it down
10 and then come back. If you look at Slide 6, Your Honor,
11 this is the uses estimate, which shows you the confirmation
12 hearing estimates for claims, etc., that we were using at
13 the time of the hearing.

14 We also had the June status update and you can see
15 the estimates as of that date, and then sort of actual
16 today. The answer to your question, Your Honor, is all of
17 the estimates are consistent and within the confirmation
18 hearing range. When we were at 210 to 278 total, we're at
19 256.

20 And in the breakdown, we're actually, in terms of
21 503(b)(9)s and other admins, we're actually a little bit
22 lower than even our low range, Your Honor. We're showing
23 about 83 million for 503(b)(9), the low range was 90. And
24 for the other administrative expense claims, we were at
25 about estimating 50 million and they're showing now 42.1.

1 So, we're a little bit ahead in terms of the confirmation
2 estimates of what the claims were going to be.

3 THE COURT: Okay. Thanks.

4 MR. SINGH: You're welcome, Your Honor. Just,
5 Your Honor, I'll scroll back up on Slide 3 just to summarize
6 the distributions that have been made for administrative
7 creditors. So far there have been two: the initial
8 distribution of 21 million, plus there was a second
9 distribution that commenced in August of last year of
10 roughly 19 million. So, we have disbursed that amount.

11 We've got some uncashed checks and issues like
12 that, Your Honor, and disputed claims reserves, but we've
13 gotten 18.8 million ready for distribution out the door for
14 folks that are entitled to them.

15 THE COURT: In the second distribution?

16 MR. SINGH: Correct, Judge, in the second
17 distribution.

18 THE COURT: Yeah, okay.

19 MR. SINGH: Which included a catchup distribution
20 for those who didn't participate in the first to sort of
21 bring everybody parry.

22 THE COURT: Right.

23 MR. SINGH: So, Your Honor, if you look at Slide
24 4, this is really the key slide, I would say, for today's
25 presentation, which is the additional funds necessary to go

1 effective. And what we've shown here judge is the estimates
2 or sort of the numbers that were before you on the June
3 status conference and where we are today, and the variance,
4 so you can sort of see how we've been tracking during the
5 case.

6 Your Honor, the estimated cash -- and you can see
7 that up top -- is -- or I should say estimated assets, is
8 \$39.2 million. The cash line there is 16.8 after you take
9 into account total reserves, that's the net cash line. And
10 I would just note, Your Honor, the 16.8, if you recall from
11 our Administrative Consent Program, there were sort of two
12 reserve accounts.

13 One was the \$25 million for litigation trust
14 expenses, so that's not in this number. That was segregated
15 and is being dealt with and administered. And then the
16 other was \$10 million, which we've noted in Footnote 1, for
17 a cash reserve account for estate expenses, etc., to assist
18 in going effective, that would not be distributed to
19 administrative creditors.

20 So, really, the sort of total available cash, when
21 you take into account that 10 million reserve, is 6.8. Your
22 Honor --

23 THE COURT: I'm sorry, 16.8?

24 MR. SINGH: 16.8 but there's two 10 millions, Your
25 Honor.

1 THE COURT: Minus the reserves?

2 MR. SINGH: Correct, correct.

3 THE COURT: Okay.

4 MR. SINGH: It's a little confusing because
5 there's two 10 millions. There's total reserves for the
6 estate for ongoing sort of administration expenses, etc.,
7 other disputes that we have, disputed claims -- that's 10
8 million. And then we had a separate 10 million of the cash
9 reserve that's permitted under the Administrative Consent
10 Program.

11 So, really it's \$20 million and that's how I get
12 to 6.8. But the 16.8 includes that cash reserve that's not
13 really allocated for anything, it's just a permitted reserve
14 under the Consent Program.

15 THE COURT: Okay.

16 MR. SINGH: Your Honor, so really estimated cash
17 before you have certain tax appeals we're taking, the
18 preference claims, and what we use shorthand as the ESL
19 litigation, but really the sort of larger litigation that's
20 being handled by the Akin firm, and Mr. Dublin is on. But
21 that -- estimated assets is \$39.2 million.

22 The reduction, Your Honor, I would just note that
23 it sort of gets you to -- the \$20.5 million reduction, it's
24 not like we've lost assets. We've made a distribution of
25 almost 19 million, so that accounts for pretty much all of

1 it. But that's the delta.

2 We've projected here, Your Honor, in terms of
3 claims and then estimated uses or expenses, you can see
4 below. The total remaining claims to be satisfied are
5 \$109.1 million. You know, that includes the Administrative
6 Consent Program, you know, \$85 million, and just, Your
7 Honor, so you have the reconciliation, the 90 and 85, the
8 difference just is the \$5 million of reserves that we have
9 for ongoing disputed claims.

10 The priority tax is 3 million. Your Honor, I just
11 want to note here, we were originally showing \$15 million
12 but, as permitted under the plan, we can stretch out the
13 priority tax payments. So, in terms of just going
14 effective, we only need \$3 million.

15 It's not that the estimate of tax claims has been
16 reduced. We just sort of adjusted our thinking and
17 clarified that for going effective you need three, although
18 the asserted amount is 15. Or we think the estimated amount
19 is 15.

20 And then you've got the secured claim and the
21 priority nontax, which generally remain consistent, and we
22 just adjusted our estimate for what we think the claim is
23 allowed.

24 I would note, Your Honor, the secured creditor
25 obviously continues to maintain its claim at 18, and we are

1 in discussions with them in hopes that we can try to come to
2 a resolution.

3 So, for claims purposes, Judge, what's remaining
4 and sort of the shortfall between current asset is 69.9.
5 We've included in here an estimate, assuming another year.
6 And I'm not here to suggest, Judge, that we intend to go
7 another year.

8 We just sort of projected those out and what that
9 would look like potentially. And that's roughly \$27.5
10 million of expenses, leaving you -- if we were to go
11 effective at the end of the year -- 97.3. Now, we hope to
12 go effective much sooner than that.

13 I would note, Your Honor, we've already commenced
14 discussions with the administrative claims representative,
15 the Creditors Committee, to start thinking about ways to
16 accelerate the effective date and recognizing, of course,
17 really that at this point, as we sort of expected, the key
18 to going effective will be dependent on recoveries and
19 timing from remaining preference claims and the sort of
20 larger ESL litigation that's before Your Honor.

21 THE COURT: Can I interrupt you again?

22 MR. SINGH: Yes, of course.

23 THE COURT: The estimated 27.5 million for post-
24 confirmation expenses for another year, that doesn't include
25 the \$25 million, for want of a better term, litigation

1 reserve, right, for ESL?

2 MR. SINGH: Right, that's separate and apart.
3 This is -- this is the sort of other estate expenses, Your
4 Honor.

5 THE COURT: And as far as preference claims or
6 preference litigation, that's really on a contingency fee --

7 MR. SINGH: Correct, yeah.

8 THE COURT: So, I'm puzzled by that amount. I
9 understand that a lot of work has been done already on the
10 claims, and that obviously requires significant work by
11 professionals to deal with a billion and a half of
12 administrative expense claims that have been asserted and
13 other claims.

14 But it looks like, as you said, you're kind of at
15 the homestretch with that effort, and the remaining assets,
16 other than the litigation, are fairly -- you know, there's
17 real estate -- it's fairly de minimis. I mean, a lot of
18 works' been done on those too, I think, at least as far as
19 the Calder sculpture is concerned. So, what's going into
20 that \$27 million number?

21 MR. SINGH: So, Your Honor, there's a couple of
22 things that are making it up, and we may be a little too
23 conservative. I'm very hopeful that we spend a lot less
24 than this amount. But we did sort of -- and we are seeing
25 all of the fees trending down considerably. There are a

1 couple of things that do remain, Your Honor, that sort of
2 are building into the expenses.

3 One, of course, we are expecting a negotiation
4 here and hopefully a resolution with the administrative
5 claims representative and other administrative creditors,
6 the Creditors Committee, etc., of trying to accelerate the
7 effective date and negotiate around that. So, we do expect
8 there to be some work around case resolution.

9 In addition, Your Honor, you're right on the
10 preference claims, that that is all sort of contingency fee-
11 based, so there's really not much, if anything, of a
12 preference fee claim base in here. But there are still some
13 other administrative expense claims that remain, so we do
14 have that. On top of it we have remaining real estate
15 assets. As you can see, I mean, we are down to sort of the
16 tail end of those.

17 So, it's a culmination of those things and you're
18 really looking at about maybe \$2 million a month is kind of
19 where we were, and maybe that's a little too high, but
20 that's what we were expecting. I really don't expect that
21 we're going to be spending all of the \$27.5 million, but
22 that was what was building into the estimate.

23 THE COURT: Okay, all right, thanks.

24 MR. SINGH: Your Honor, post -- what we tried to
25 do on page 5, and I already kind of walked through it with

1 you on page 6, is just to offer a bridge for Your Honor and
2 parties in terms of just sources and uses. Kind of what we
3 were projecting at the confirmation date. We also included
4 the estimates as of the May 30th status update and just what
5 we've collected through the estimate through the end.

6 Your Honor, I think the good news is at least that
7 sources have increased considerably in terms of estimates
8 and actuals. From the confirmation date -- and this is
9 excluding the preference recoveries and the ESL-related
10 litigation -- have increased \$60 million since where we were
11 at confirmation, and another \$11 million from where we were
12 at the may hearing.

13 I think most -- or not most, I should say -- some
14 of that you can see is real estate proceeds. We've already
15 collected -- and confirmation of this on the third line --
16 we were projecting 13.1 million. We've already collected
17 14.1 and are expecting another \$3.5 million.

18 We've had the ESL, or I should say transform -- I
19 apologize, Your Honor -- settlement that Your Honor approved
20 last year where we were able to pick up the utility deposit.
21 So, that went from 4.7 to \$9 million. And we've -- it also
22 includes the transform 503(b)(9) obligations that were
23 satisfied. And you can sort of see here the deltas and the
24 differences from where we were able to pick up that
25 additional value.

1 So, that kind of gets you from confirmation,
2 Judge, to where we are today in remaining assets -- of
3 course, excluding, again, as I mentioned, the preference
4 recoveries and what we refer to as the ESL litigation,
5 although obviously that's a much broader dispute.

6 THE COURT: Right.

7 MR. SINGH: And then, Your Honor, you've got the
8 uses line, which I touched upon earlier in response to Your
9 Honor's question.

10 What we've got really here are totally remaining
11 uses which do remain within the confirmation range.
12 Obviously, given that the case has taken longer than we all
13 had hoped and were expecting, there is the professional
14 fees, board fees, etc., have sort of continued.

15 I would note, Your Honor, it's not as if those are
16 expenses that would not had been incurred in large part
17 anyway. I mean, a lot of that does relate to claims
18 reconciliation, resolving disputes in connection with making
19 distributions and sort of getting to the point where we've
20 gotten. I'm not suggesting all of it would have been
21 incurred but certainly there is a big chunk in there that is
22 timing related.

23 THE COURT: Right.

24 MR. SINGH: Your Honor, and then finally we wanted
25 to just give a high-level update on avoidance recovery.

1 Your Honor may have seen, or I'm sure you get the updates --
2 there are a lot of adversary proceedings. Luckily, I don't
3 think you've had to handle much of that. We've been dealing
4 with most of it directly in the background with
5 counterparties.

6 But approximately a third, I would say at this
7 point, of the preference matter just in terms of the number
8 of preference issues, have been settled, have been resolved,
9 resulting in about \$40 million of value, which includes both
10 cash that's come in the door as well as administrative or
11 priority claims that have been waived. So, sort of the
12 aggregate value that we've collected.

13 What we've got remaining, Judge, and complaints
14 are filed is another, I'd call it, about 1,100 matters, as
15 you can see from this chart. Roughly, \$600 million of gross
16 preference period transfers that are remaining after you
17 eliminate what the preference specialists have determined to
18 be ineligible for various reasons, such as assumption and
19 they're dealt with as part of cure or what's already been
20 settled. So, still quite a bit of wood to chop there and
21 continue on, but we are making progress.

22 THE COURT: Okay. Can we go back to page 6 for a
23 second?

24 MR. SINGH: Yes, Judge.

25 THE COURT: What is the other liability to the

1 expenses category?

2 MR. SINGH: Your Honor, let me see if I can...

3 I'm not sure. Let me see if I can get an answer to that
4 question from Mr. Murphy. I don't recall exactly what that
5 line item included.

6 THE COURT: Okay.

7 MR. SINGH: But I will get Your Honor an answer.

8 THE COURT: Okay. All right. You can just keep
9 going and he'll probably email you or --

10 MR. SINGH: Yeah. The luxury of remote, Your
11 Honor, is that I'll probably get a text or an email very
12 shortly. So, Your Honor, just in terms of sort of the
13 remaining takeaways, the key takeaways here: our performance
14 and projections are consistent with what we've been
15 estimating throughout, although obviously we're here longer
16 and haven't gone effective longer than what we were hoping
17 and would have liked because of the challenges that remain
18 in the case.

19 Really emergence does remain, in terms of if we
20 were to just sort of come up with the cash to sort of, you
21 know, finalize the claims and make those distributions, does
22 remain heavily contingent on the -- because of the larger
23 ESL litigation and collection of preference recoveries.

24 I would note, Your Honor, we are, as I said
25 earlier, we've commenced discussions, productive discussions

1 with the administrative representative and the Creditors
2 Committee to think about other ways to accelerate an
3 effective date and get this case to the finish line. I
4 would say those are the very early stages but we're hopeful
5 that the parties can put their heads together, as we've done
6 before, and come up with the right answer.

7 In terms of remaining disputed claims, as I said,
8 Your Honor, there's not much left, thankfully. I mean,
9 we've done a lot of work already but we are sort of ready to
10 finalize those reconciliations and get those finalized and
11 done.

12 So, Your Honor, that was the full presentation I
13 had this morning. I'll get you an answer to your question.
14 I apologize. But happy to answer any other questions Your
15 Honor may have.

16 THE COURT: Okay. Other than the one that you're
17 going to get a reaction from from Mr. Murphy, I don't have
18 any other questions. I do note that I owe the parties a
19 ruling on the hundreds of pages of motions to dismiss in the
20 so-called ESL litigation and that will be coming fairly
21 soon.

22 But it's also, I think, fair to assume that that
23 litigation, unless settled and there may be incentive to
24 settle it on both sides, including insurers, won't be for
25 quite a long time.

1 So, it would seem to me that if there is to be a
2 way to promptly or reasonably promptly come up with
3 sufficient cash to go effective by paying the admin claims,
4 it would either have to be, as you were suggesting, as part
5 of some sort of agreement or through the preference
6 litigation.

7 MR. SINGH: Yes, Your Honor.

8 THE COURT: Okay. Does anyone have any questions
9 for Mr. Singh or the Debtors? No? Okay, all right. Thank
10 you for the update. I guess we should expect one --

11 MR. SINGH: Your Honor, probably -- yeah, I mean,
12 we'll try to do it sooner, Judge. We'll try to do it
13 quarterly especially if there is a meaningful update for the
14 Court. But, yes, certainly no later than May.

15 THE COURT: Okay, very well, thanks.

16 MR. SINGH: Thank you, Your Honor.

17 THE COURT: All right. So, why don't we then just
18 continue down the agenda. And at this point, it's not a
19 long agenda. Most of the matters that are on it have been
20 adjourned.

21 MR. SINGH: Correct, Judge.

22 THE COURT: But I have actually the only matter to
23 be considered on today's agenda besides the report that you
24 just gave is the motion by Pearl Global Industries, Ltd. for
25 allowance and payment of a substantial contribution claim

1 under Sections 503(b)(3)(d) and 503(b)(4), the Bankruptcy
2 Code.

3 MR. SINGH: That's right, Your Honor. That's the
4 only matter. And I see Mr. Wander on the dashboard and so
5 I'll cede the podium to him to present his motion.

6 THE COURT: Okay. Before -- actually, before we
7 do that, and maybe this is just a -- maybe I just hit the
8 wrong button -- I do see that Mr. Harner from Ballard Spahr
9 might've raised his hand to speak. Is that right, Mr.
10 Harner? Sorry, I can't hear you. You might be muted.

11 MR. HARNER: Apologies, Your Honor, I had pressed
12 the hand raise successfully but not the unmute button. It
13 was only for the purpose of asking to be excused, if I
14 could.

15 THE COURT: Oh, that's fine. That's fine, you
16 can.

17 MR. HARNER: Thank you, Your Honor.

18 THE COURT: And anyone else who's on the line for
19 something other than the Pearl motion under 503(b)(3) and
20 (4). Before I hear from Mr. Wander, counsel for Pearl
21 Global Industries, let me just say that I think I've read
22 all the pleadings on this, which are the motion and
23 supporting affidavit with exhibits, of course, by Global,
24 the objection by the Debtor, the pleadings filed in support
25 of the objection by the administrative expense claims

1 representative and by the Official Unsecured Creditors
2 Committee. And then Pearl Global's reply and the
3 accompanying affidavit by Mr. Wander. I don't think there's
4 anything filed in connection with this motion besides that,
5 but I've reviewed each of those documents.

6 So, Mr. Wander, if you want to go ahead. You can
7 assume that I've reviewed those but you can supplement them
8 or rest on them or argue whatever you want to in support of
9 this motion.

10 MR. WANDER: Thank you very much, Your Honor.
11 David Wander of Davidoff Hutcher & Citron, counsel for Pearl
12 Global. Your Honor, I just want to highlight a few points.
13 And in the preliminary statement in Pearl's reply I set
14 forth what really are the questions raised by the objections
15 that have been filed.

16 The first one, and it's really kind of a
17 gatekeeping issue for Your Honor, is is a million dollars in
18 the context of the distribution to the administrative
19 creditors who've received in round numbers \$40 million? So,
20 that would represent 2.5 percent of the total funds that
21 have been paid to date.

22 And based on the status report by the Debtor, that
23 may be the only funds right now we see for possibly another
24 year that will have been paid, absent some change to the
25 plan that Debtor's counsel indicated may be under discussion

1 with the administrative claims representative and the
2 Creditors Committee.

3 So, from the point of view of the administrative
4 creditors who've received the money -- and I represent one
5 who's received the money, that's Pearl Global -- I represent
6 several who have not received any money -- that's a
7 substantial amount.

8 In fact, if this case were to be very successful
9 and the people litigating against ESL get a tremendous
10 recovery, I believe the projections in the disclosure
11 statement for the possible distributions to unsecured
12 creditors is a couple of penny. Maybe one penny, two
13 pennies, three pennies.

14 So, from the point of view of the creditors, not
15 the professionals, because as I say to them, I agree, a
16 million dollars to the professionals is -- the retained
17 professionals -- it's not a lot of money. But I submit to
18 Your Honor that the million dollars that Pearl Global
19 negotiated when it settled its claim with no obligation to
20 try and get the million dollars for everyone, that that's a
21 substantial amount.

22 The second issue --

23 THE COURT: Can I interrupt you on that?

24 MR. WANDER: Yes, Your Honor.

25 THE COURT: Maybe you're going to get to this in a

1 minute but I thought the main point raised here was not that
2 a million dollars is insubstantial -- to most people, a
3 million dollars is a lot of money -- but rather that the
4 payment was merely a timing issue. That if it wasn't paid
5 in distribution number one, it would have been paid in
6 distribution number two, i.e., the \$18.4 million second
7 distribution would've been 19.4. And, therefore, all you're
8 talking about is the time value of a million dollars between
9 the first distribution and the second one.

10 MR. WANDER: Yes, Your Honor, I honestly didn't
11 understand that point because I negotiated for the million
12 dollars as part of the settlement of Pearl Global's claim.
13 Had I not done that, there would not be that million
14 dollars.

15 THE COURT: Why is that? Wouldn't it be simply
16 freed up for the next distribution?

17 MR. WANDER: No, because that came from the
18 professionals. That was their money that they were giving
19 up. It was a contribution from them. And if Your Honor may
20 recall, you had a colloquy with Debtor's counsel, Mr.
21 Schrock, talking about how his partners may not be too happy
22 with him. You understood that. By money -- at that time,
23 you were talking about the additional 9 million, I believe.

24 So, I, for lack of better words, grabbed a million
25 dollars from their pocket and Your Honor later in the

1 hearing at the second day of the confirmation hearing, you
2 added another 9 million. So, that million dollars, Pearl
3 Global created that million dollars. But for Pearl Global's
4 settlement, that wouldn't have been paid. You would have --

5 THE COURT: You don't think I might not have said
6 to Mr. Schrock in any event, you're going to have to hold
7 back and take a risk on 10 million instead of 9 million?

8 MR. WANDER: But that money has not been paid. If
9 Your Honor looks at the status report that the Debtor just
10 provided, you'll see the professional fee carve out funding
11 of \$9 million, I believe, that's being held in reserve. So,
12 that would've been 10 million. That million dollars would
13 not have been paid in the second distribution.

14 THE COURT: We're still talking about time value
15 of money, though, right?

16 MR. WANDER: Right, that's money that would not
17 have been paid out at all by now and maybe never.

18 THE COURT: Well, again, that's assuming that I
19 wouldn't have just had a round 10 million be held back by
20 the professionals because they're sort of expense creditors,
21 too.

22 MR. WANDER: Correct, Your Honor. They're
23 administrative creditors and they received a round number of
24 over 200 million. If there's 50 -- there's 49.5 million in
25 the professional fee carve out funding that I'm looking at,

1 which includes the 9 million.

2 So, yes, time value of money is important,
3 especially to the administrative creditors who hadn't been
4 paid for providing services during the bankruptcy or during
5 the 20 days before the bankruptcy.

6 So, the additional million, the additional 2.5
7 percent on a blended rate, Your Honor, is a significantly
8 amount that they've received and is probably all the will
9 have received for the next year. So, that's for two years
10 after confirmation.

11 THE COURT: Well, the federal judgment rate, \$1
12 million over two years, is less than the amount you're
13 seeking.

14 MR. WANDER: But the point is that the creditors
15 need that money. So, the time value in theory doesn't
16 address the real needs of the creditors of this Debtor, who
17 supported the Chapter 11. We're talking about the vendors
18 who continued to supply goods and services to the Debtor
19 with the expectation that they would be paid in the ordinary
20 course of business. Now, Your Honor previously said --

21 THE COURT: I understand all that, Mr. Wander, I'm
22 just focusing on the arguments back and forth as to whether
23 this sum was de minimis or not, or extraordinary. And I
24 think we've had enough on it. I understand your arguments.
25 I think you probably understand mine, and we can move on.

1 MR. WANDER: Thank you, Your Honor. So, the next
2 point that was raised by the objections is whether Pearl was
3 acting purely for its own benefit as the objector's contend
4 --

5 THE COURT: Well, the word purely is a red
6 herring, right? Because that's not the standard when one
7 looks at benefit.

8 MR. WANDER: Correct.

9 THE COURT: They're two different points. It's
10 primarily to benefit the client as opposed to purely.

11 MR. WANDER: Correct.

12 THE COURT: So, anyway -- but in any event --

13 MR. WANDER: If I may, Your Honor?

14 THE COURT: Yeah.

15 MR. WANDER: You're correct, Your Honor. The word
16 purely is a red herring. It has really nothing to do with
17 the standard. What the standard is a direct net benefit.
18 If I was simply advocating for Pearl and only for Pearl,
19 which is what happened in all of the cases that have been
20 cited -- none of the cases did a creditor altruistically try
21 and benefit others.

22 The law, the standard, is the direct benefit, not
23 indirect. So, I submit there's nothing more direct than
24 getting money for all administrative creditors. So, that's
25 the standard as Your Honor mentioned in Bayou --

1 THE COURT: I'm sorry to interrupt you but there's
2 a second element to the standard besides a direct and
3 substantial net benefit to the creditors and/or the estate
4 as a whole -- and that phrase as a whole is important.

5 It is well-recognized -- and this is from the
6 Bayou case, too -- that, quote, "Creditors face an
7 especially difficult burden in passing the substantial
8 contribution test since they are presumed to act
9 primarily..." -- again, primarily, not purely --
10 "...primarily for their own interest. And services
11 calculated primarily to benefit the client do not justify an
12 award, even if they also confer an indirect benefit on the
13 estate." So, and that's articulated in many cases.

14 So, I think there are really two points here. It
15 has to be a direct benefit, and if you want to say that
16 direct includes primarily for the estate and creditors as
17 opposed to primarily for the movant, then you can conflate
18 the two. But who this work is for and the burden that a
19 movant faces on that issue I think is a factor that the
20 Court needs to consider, besides just whether there is a
21 material net benefit to the creditors and/or the estate as a
22 whole.

23 MR. WANDER: Yes, Your Honor. And this was
24 addressed actually by Judge Galgay -- if those -- some
25 people remember Judge Galgay, as I'm sure Your Honor does.

1 It involved a case where Weil Gotshal was seeking a
2 substantial contribution, and I believe that was mentioned
3 in -- I believe it was Best Products, it may have been -- I
4 believe it was Judge Brozman's case for General Oil. And in
5 this case, what Judge Galgay -- what was noted in the
6 decision was that when Weil Gotshal requested the
7 substantial contribution award, they did not include
8 services that directly benefitted their client. And that's
9 what I did, Your Honor.

10 The fees that I'm seeking and the time records do
11 not include any services that were only for Pearl Global.
12 So, the services that Pearl Global is seeking payment for
13 are only those services that related to its actions for all
14 of the administrator creditors or, in particular, the
15 foreign vendor administrative creditors.

16 But in the end, when Pearl Global got the million
17 dollars, it got it for all administrative creditors with
18 allowed claims and it wasn't limited to any category.

19 So, I addressed that, Your Honor. And so all the
20 services that Pearl Global is seeking payment for had to do
21 with forming the committee, organizing it, giving the
22 committee for a period -- I'm sorry, it wasn't a committee,
23 it was a group, our ad hoc group. It was to give them a
24 seat at the negotiating table. We had a seat for a while,
25 then it was to advocate for all administrative creditors,

1 other than professionals, at the confirmation hearing. And
2 I spent several hours cross-examining the Debtor's
3 witnesses. I believe I was the only one who cross-examined
4 in a fulsome manner the Debtor's witnesses. And it provided
5 for a much more fulsome record.

6 And then after the first day, during the
7 continuation, I argued not just for Pearl Global but for all
8 the nonprofessional administrative creditors. I can't -- in
9 looking at the cases, Your Honor, it's extraordinary what
10 Pearl Global did. It's exactly, I submit, what the statute
11 is for. And knowing that your --

12 THE COURT: Can I interrupt you there?

13 MR. WANDER: Sure.

14 THE COURT: When you appeared at the confirmation
15 hearing, you appeared on behalf of Pearl Global and two
16 other entities, not on behalf of an ad hoc committee or a
17 group, right? That's how you're listed, that's how you were
18 introduced --

19 MR. WANDER: Correct.

20 THE COURT: And let me just continue. The
21 pleadings that were filed were on behalf of Pearl Global and
22 the other two clients that are listed in the Notice of
23 Appearance, right?

24 MR. WANDER: Correct.

25 THE COURT: And other members of this ad hoc group

1 also appeared for their clients at the confirmation hearing,
2 like Mr. Sarachek.

3 MR. WANDER: Yes, Your Honor.

4 THE COURT: And, in contrast, Foley and Lardner
5 appeared on behalf of an ad hoc group or committee of admin
6 expense creditors, I think.

7 MR. WANDER: Yeah.

8 THE COURT: One last question. There was never
9 any statement filed under Bankruptcy Rule 2019 by your firm
10 as a representative of this ad hoc group, right?

11 MR. WANDER: Correct, Your Honor. And if Your
12 Honor may recall, and it's in my declaration, before
13 confirmation, I attended several chambers conferences along
14 with Debtor's counsel and the committee, and I think one
15 before Foley and Lardner and I think one after they became
16 involved. And I let Your Honor know when I appeared that I
17 was appearing for Pearl and also for an ad hoc group. I
18 made that clear. But --

19 THE COURT: But formally you didn't do that,
20 right? So, they wouldn't know that you were appearing on
21 their behalf.

22 MR. WANDER: Your Honor, all the people in the
23 group knew throughout that I was advocating for everyone.
24 Weil Gotshal knew that --

25 THE COURT: But we don't know what that group is

1 and there was no 2019 statement filed, the purpose of which
2 is to make all of that clear.

3 MR. WANDER: Well, Your Honor, again, I advised
4 Your Honor at the chambers conferences. I had communicated
5 -- it was no secret to the Debtor. I originally reached out
6 before Foley & Lardner was involved -- I originally reached
7 out to first the Debtor and then the Creditors Committee on
8 behalf of the group.

9 We negotiated over a term sheet with the
10 committee. They knew I was representing -- not formally
11 representing -- I was organizing and advocating for a group
12 of approximately 35-40 foreign vendors. The Debtor knew
13 this.

14 When I attended the meeting with the Debtor, the
15 committee and other representatives of the estate along with
16 Foley & Lardner, they knew I was coming, not as -- only as
17 Pearl Global's attorney; I was coming to represent the
18 group, the ad hoc group that I organized and it's been known
19 all along.

20 And then during the confirmation hearing -- and
21 this is in the reply papers -- at one point when I was
22 advocating for the non-opt out group, Your Honor said to me,
23 Mr. Wander, you have no standing to make that argument. But
24 I made it for the others. And in the beginning and during
25 my presentation when I was saying that a lot of the cash on

1 hand should go to the administrative creditors, I was
2 arguing for everyone.

3 It's a well-known fact. It's documented in the
4 record that while I formally was representing Pearl Global
5 and two other administrative creditors at that time,
6 everyone in the case knew I was there advocating for all of
7 the nonprofessional administrative creditors. And --

8 THE COURT: Mr. Wander, you didn't have the
9 authority to bind anyone other than your client, right?

10 MR. WANDER: Correct. And that was clear to the
11 Debtor, the committee. They knew I was acting as a conduit
12 for a group of creditors, a stakeholder group, that had
13 become the fulcrum creditor group. So --

14 THE COURT: Did you inform that whole group of
15 their ability to not accept the terms of the settlement that
16 Pearl Global negotiated?

17 MR. WANDER: No, if Your Honor remembers, the
18 timing was the settlement construct was announced, I think,
19 two days before the confirmation hearing. As of the
20 confirmation hearing, I hadn't even had a chance to really
21 review it because I was preparing for the hearing. And then
22 it was a weekend that I negotiated and I think we showed up
23 on Monday, and Mr. Singh read the settlement into the
24 record. And all I was doing was giving everything a million
25 dollars.

1 THE COURT: And how much was the ad hoc -- were
2 the members of the ad hoc group informed of those
3 negotiations?

4 MR. WANDER: I'm sorry, Your Honor?

5 THE COURT: How much were the members of that ad
6 hoc group informed of your negotiations?

7 MR. WANDER: Well, anyone who was listening in or
8 attending the confirmation hearing would've heard Your Honor
9 several times saying to me or Mr. Schrock, go in the hallway
10 and settle Pearl's claim, or why don't you settle with Mr.
11 Wander? And that's how we left the hearing was Your Honor
12 basically saying to the Debtor and to me, go do your best to
13 settle this claim and Pear Global's objections. So,
14 everyone who was listening in knew that.

15 But, no, over the next few days, I was dealing
16 with the Debtor with respect to their preference claim and I
17 spoke to the attorney at Ask who was handling that, and we
18 went over that, and that was encapsulated into the
19 settlement and the reduction of Pearl Global's claim from
20 approximately a million-5, to I think a million-130.

21 And Your Honor asked Mr. Singh on the record when
22 he announced the settlement whether that had been looked
23 into. And Mr. Singh made it clear that they analyzed the
24 claim and they just weren't throwing the money at Pearl
25 Global to get rid of me.

1 So, everything was on the record and the people in
2 our group, they had their own counsel. Everyone knew I was
3 playing a facilitating role, and that's what I did. And
4 that is what I submit the statute is supposed to cover.
5 We're supposed to encourage, in appropriate cases, an
6 attorney doing something extraordinary.

7 I pointed out in my reply that there's no -- in
8 the Bankruptcy Code, there's no fiduciary to represent
9 administrative creditors in an administratively insolvent
10 case.

11 And so I think it's extraordinary what Pearl
12 Global did through their counsel, and they've had a direct
13 benefit. And I think what I did and what Pearl Global did
14 should be applauded and not attacked. And in the grand
15 scheme of this case with 200 million going to the
16 professionals and Pearl Global, you know, fighting against
17 the Debtor's counsel and the committee counsel to extract
18 value for all administrative creditors, that should be
19 applauded and it should be rewarded.

20 And for the million dollars that represents now
21 2.5 percent of what's been distributed, I submit that the
22 217,000 requests -- that's 215 in fees and approximately
23 2,000 in expenses -- is very reasonable. I mean, it's
24 basically a 4.5 one return on the money.

25 THE COURT: Okay. Anything more?

1 MR. WANDER: I think what I just said, Your Honor,
2 and the papers -- if Your Honor has any other questions, or
3 I'll respond to any comments by the objectors.

4 THE COURT: Okay.

5 MR. SINGH: Good morning again, Your Honor. Sunny
6 Singh, Weil Gotshal, on behalf of the Debtors. Your Honor,
7 the back and forth between Your Honor and Mr. Wander, you
8 covered actually a lot of points that I was going to raise,
9 so I will not repeat those. I'll just highlight a couple of
10 issues, Your Honor.

11 As you noted, Your Honor, there was no 2019 ever
12 filed. You know, Mr. Wander never had the ability to bind a
13 larger group of creditors and was certainly not representing
14 them, although I don't disagree that he was trying to
15 collect larger creditors so that he had a larger -- or they
16 had a larger voice in the case. But that's not really the
17 standard, Your Honor.

18 And I would note -- and I really didn't intend to
19 get into all the back and forth of why negotiations broke
20 down -- but, frankly, once the Debtors realized that he did
21 not have a, quote-unquote, "ad hoc group" that he could
22 find, that was a significant factor for why it really didn't
23 make sense to continue communicating with him about a
24 settlement because it was a settlement to nowhere.

25 In terms of -- Your Honor, let me just address one

1 factual point, his comments about the \$9 million, and the
2 report we gave this morning, and the carve out. The 9
3 million is separately listed but that does not mean that the
4 other funds were not moved over and would not have
5 ultimately been moved over.

6 Your Honor may recall that initially, as part of
7 the administrative claim settlement program that we agreed
8 to with the Foley group, the professionals had agreed to
9 move over \$2 million.

10 That number was increased to \$3 million after the
11 discussion and resolution with Mr. Wander. That number is
12 already in the cash number in the line items because it had
13 already been moved over in sort of the way the confirmation
14 hearing estimates were. And the 9 million was as a result
15 of Your Honor's ruling that subsequently came over and, to
16 correct what Mr. Wander said, has already been moved over.
17 So, Judge, there really was a total of 12 million that was
18 moved over. And I would also note --

19 THE COURT: That's fine. When you say -- Mr.
20 Singh, when you say moved over, what do you mean? Moved
21 over --

22 MR. SINGH: I'm sorry, Your Honor, just to be
23 clear. So, there was the professional fee escrow account
24 that was set up under the DIP order, where professionals
25 were providing estimates -- retained professionals were

1 providing estimates for professional fees as they were being
2 incurred, and then they get trued up from time to time.

3 So, there are two accounts: there's the
4 professional fee escrow account, and then there's the
5 Debtor's general operating accounts. So, the professional
6 fee escrow account was segregated, held in trust exclusively
7 for the benefit of the professionals.

8 So, as part of the settlement with the Foley group
9 and then Pearl, \$3 million was transferred voluntarily from
10 the professional fee escrow account in connection with the 2
11 million before confirmation, to move it over into the
12 general operating account so that it could be distributed.

13 Later, as Your Honor -- after Your Honor's ruling
14 regarding an additional incremental \$9 million to be
15 transferred from the professional fee escrow account to the
16 general operating account -- and I would note, Your Honor,
17 your ruling just said, you know, if it's needed later.

18 The professionals just went ahead and moved it
19 right away and dealt with it in the confirmation order of,
20 you know, if there was a shortfall, how the sharing would
21 work. But that was transferred from the professional fee
22 account, again, to the general operating account to satisfy
23 the various conditions under the Administrative Consent
24 Program.

25 So, including the, for example -- you know, we had

1 to hit \$25 million, which we didn't have at the time, for
2 the litigation trust funding, we had to hit the 10 million
3 for the cash reserve account, and then the excess was
4 distributed.

5 So, you know, all of those funds, 12 million in
6 total, were transferred from the professional fee account to
7 the general operating account and used for purposes of
8 satisfying the conditions under the Administrative Consent
9 Program and making distributions.

10 THE COURT: So, I think both you and the committee
11 in its statement of support of the objection state that the
12 \$1 million that Mr. Wander is referring to would have been
13 part of a second distribution anyway. What is the -- what
14 is the basis for that statement then?

15 MR. SINGH: Two bases, Your Honor: One, we think
16 Your Honor would've required it anyway as part of the
17 ruling.

18 Two, Your Honor, the professional fee escrow
19 account is trued up from time to time as estimates become
20 actuals. And I would report, Your Honor, that in subsequent
21 distributions and the second distribution in particular, an
22 incremental \$7 million was moved over from the professional
23 fee account as estimates became actuals and we recognized
24 that there were some excess in there.

25 So, you know, over time, those amounts, we think -

1 - and they were moved over in the second distribution but
2 over time they would've been moved over anyway.

3 THE COURT: Okay. I.e., the reserves are not
4 permanent reserves. They're adjusted based on actual --

5 MR. SINGH: Exactly, exactly, Your Honor.

6 THE COURT: -- quote on fees.

7 MR. SINGH: Of course, exactly. We estimate them
8 as we're going but, of course, once the professionals have
9 their final tallies and statements are filed, you know,
10 there's true ups in accordance with the DIP order.

11 THE COURT: Okay.

12 MR. SINGH: Your Honor, with those corrections to
13 the record, I would then sort of just go back to, you know,
14 the overall context in which Mr. Wander is appearing for
15 this claim. And Your Honor knows the standard very well so
16 I'm not going to sort of sit here and repeat.

17 But I think there's a stark contrast, and when you
18 just look at the Bayou case where Your Honor awarded
19 substantial contribution applications and Judge Brozman's
20 decision in Best Products and the facts of the two cases,
21 and the distinctions and why she denied it, and I think this
22 all becomes very clear.

23 I mean, it's very extraordinary relief that Mr.
24 Wander is asking for. I mean, you don't see a substantial
25 contribution application filed and let alone granted every

1 day. In Bayou, Your Honor had a fraud situation, right?
2 There was a group of creditors who authorized prior to the
3 filing because the Debtor was engaged in fraud and there was
4 sort of nobody looking out for the protection of those
5 unsecured creditors.

6 Not the case here, Your Honor. Not even close.
7 We've got the Debtors who've had an independent
8 Restructuring Committee since day one of this case. You've
9 got the Creditors Committee who have been all over the
10 issues since day one of the case. And the issue of
11 administrative claims, Your Honor, has been on the table
12 since day one of the case, and everybody's been laser-
13 focused on it.

14 Your Honor will recall the painful hearing we had
15 with respect to the Transform sale and all of the back and
16 forth and the insistence that the Restructuring Committee
17 had in accepting that transaction as to whether the estate
18 would remain administratively solvent, and the disputes back
19 and forth we had with the committee with that.

20 And so I submit, Your Honor, that Mr. Wander's
21 saying, you know, there's no fiduciary for administrative
22 creditors is just absolutely wrong. There's a Restructuring
23 Committee. We represent the interest -- or they represent
24 the interest of all creditors of the estate. And by no
25 means have they sort of overlooked the issues of

1 administrative creditors. I would say that that's probably
2 been one of the most singular, most focused issues in this
3 entire case. You know, we frankly -- there's not some gap
4 or void by the retained professionals that Mr. Wander needed
5 to fill here.

6 So, Your Honor, that's Bayou. They just didn't
7 have that and the group was focused on preserving assets.
8 They investigated causes of actions and turned that over to
9 a trustee that was ultimately appointed, and it resulted in
10 a real net benefit to the estate.

11 On the opposite end of the spectrum, you had Best
12 Products, which, coincidentally, was a group of trade
13 creditors. One on the Creditors Committee, who was trying
14 to get its own counsel's fee -- not the Creditors Committee
15 counsel -- its own counsel's fees reimbursed for doing work
16 on behalf of trade creditors, and another who was organizing
17 a group of other trade creditors and said, well, I made some
18 objections to the plan and I put forward alternatives, and
19 that changed the outcome of the case because there were
20 incidental changes to the plan.

21 And Judge Brozman said, no, that's not enough for
22 substantial contribution. You were primarily representing
23 the interest of your creditors. And even if you had some
24 indirect benefit, that's not a substantial contribution.

25 And, Your Honor, I submit that's exactly what we

1 have here. We have best products, we don't have Bayou. We
2 have a creditor who objected to the plan who ultimately
3 settled for its singular benefit and, yes, fine, there was a
4 million dollars that they insisted would come in that,
5 frankly, as I've pointed out, would have come in anyway.
6 And they were trying to coordinate with other creditors,
7 who, by the way, appeared through other counsel to just have
8 a larger leverage and voice in the case.

9 And, Your Honor, there's nothing unique about
10 that. There's nothing remarkable about that to get a
11 substantial contribution claim. That happens every single
12 day in bankruptcy cases. It'd be a real slippery slope if
13 Mr. Wander's application is granted. You know, why not the
14 other parties who objected to confirmation? So, I really
15 don't think that there's anything unique that happened here,
16 and certainly not close to the heavy standard and the high
17 standard of a substantial contribution claim.

18 Your Honor, on the three items that Mr. Wander
19 points out in his papers as to why he's entitled to
20 substantial contribution claim, first and foremost, he
21 concedes he had absolutely nothing to do with the
22 Administrative Consent Program. I think that's an important
23 concession.

24 Frankly, maybe we gave him too much benefit of
25 what he was trying to claim. Because, you know, it's

1 certainly more arguable if you had involvement in the
2 Administrative Consult Program that there was a substantial
3 contribution. But he says, I had nothing to do with that.

4 So, then there's three things. And at this point,
5 he really is hanging his hat on the million dollars that
6 were added to the initial distribution. There's the --
7 well, he tries to allege that he had a lot to do, whether he
8 had something even to do with the change in the sort of non-
9 opt out treatment where creditors went from -- originally
10 the Debtors were proposing a 75 percent cap to an 80
11 percent.

12 And, Your Honor, if you go back, as I'm sure you
13 did, and you look at the confirmation hearing transcript, I
14 mean, it's clear as day. One of the first issues after Mr.
15 Schrock describes the Administrative Consent Program and
16 anyone is even heard on any issues, Your Honor raises the
17 point that, you know, why have this separate class? And you
18 started to ask about, you know, it's different from Toys and
19 some of the other cases, and what was the Debtor's
20 rationale, and the notice that would go out and all the back
21 and forth.

22 And following that conversation and that sort of
23 dialogue with the Court, the next day or immediately after
24 that when we could, we started to think about that. And the
25 next day when we were back before Your Honor, Mr. Schrock

1 announced -- or I announced, excuse me, the change to the
2 treatment. It had nothing to do with the objection or the
3 issues Mr. Wander was raising.

4 Similarly, Your Honor, although he has been on
5 attack of the retained professionals since he's been
6 involved in this case, which is fine -- I'm not here to
7 defend that -- but he had nothing to do with the \$9 million
8 that Your Honor required in connection with your feasibility
9 ruling, right? He was just saying, don't approve the
10 Administrative Consent Program, or if you're going to
11 approve it, move over 50 million or some ridiculous number
12 from the professional fee escrow just because it would be
13 more equitable to do that.

14 But Your Honor is the one that actually ruled,
15 based upon a feasibility determination that Your Honor made
16 after he settled, that that money may need to be available
17 and the professionals went ahead and moved it. So, really,
18 no credit can be awarded to Mr. Wander or any linkage,
19 frankly, to that.

20 And then, finally, you've got the \$1 million. And
21 putting aside the issue of -- let's just come back to the 1
22 million for a second, of how much it increased, if at all,
23 for anybody.

24 But the standard is there had to be a substantial
25 contribution, and Your Honor touched on this, to the

1 administration of the case. Right? Not just one little
2 issue or one, you know, sort of what we believe is a de
3 minimis increase that, at best, is a timing acceleration --
4 because, as I noted for Your Honor, it came over anyway.

5 But I don't see how it -- his actions advanced the
6 administration of the case. He was objecting at
7 confirmation, which happens quite often in Chapter 11 cases,
8 and in resolution of that objection, the Debtors resolved
9 his claim and offered one other issue that he was focused
10 on. And certainly nowhere near the amount that he was
11 originally requesting, and not something he was requesting
12 on behalf of all creditors, Your Honor.

13 As you noted, he appeared on behalf of Pearl and
14 two other creditors. It was not sort of negotiating on
15 behalf of a larger group of creditors. So I just don't see
16 the linkage to the administration of the case, which is the
17 legal standard, and an incremental million dollars that was
18 sent out earlier than -- as I reported to Your Honor, than
19 it would have been. Not that it never would have come in,
20 but just earlier than it would have been.

21 So, Your Honor, for those reasons, we would submit
22 that he has not satisfied his heavy burden to demonstrate a
23 substantial contribution to the case.

24 We think this is very, very different than Bayou
25 and, frankly, in line with all the other cases where

1 substantial contribution applications were denied and for
2 good reason, Your Honor. And for those reasons, we would
3 request that Your Honor deny the application.

4 THE COURT: Okay. All right, thank you. Anyone
5 else have anything to say before I turn it back to Mr.
6 Wander?

7 MS. MORABITO: Good morning, Your Honor. This is
8 Erika Morabito, Foley & Lardner, on behalf of Gary Polkowitz
9 in his capacity as the administrative expense claims
10 representative. Can you hear me okay?

11 THE COURT: Yes, I can hear you fine, thanks.

12 MS. MORABITO: Thank you, Your Honor. Mr.
13 Polkowitz is also on the phone as well with me today. Your
14 Honor, as you know, we filed a joinder to the Debtor's
15 objection to the substantial contribution application of
16 Pearl Global, and that can be found at Docket Number 9235.
17 And while we share many of the arguments you heard already
18 this morning by Mr. Singh as to why we believe this
19 application should be denied, and I'll try not to repeat any
20 of those, there are a few key points that the administrative
21 expense claims representative would like to make.

22 As Your Honor may recall, a significant and very
23 important part of the Administrative Expense Claims Consent
24 Program was something that was very heavily negotiated with
25 both the Debtors and the UCC prior to plan confirmation, was

1 the requirement of the appointment of the admin
2 representative. And it was important because he was
3 mandated with completing certain things that were set forth
4 in paragraph 52A7 and 52B of the confirmation order.

5 And Your Honor may recall because there was some
6 colloquy back and forth with Your Honor and myself about
7 those duties, and part of those were that the obligation of
8 the admin representative was to assist with the review and
9 analysis of the claims, the settlements and related
10 litigation. And he was tasked to do that to ensure both
11 fairness in the process but also to help maximize the value
12 of the Debtor's estates.

13 And part of that was to ensure that the
14 administrative creditors, who agreed to accept less than the
15 100 cents on the dollar as part of that admin expense
16 program, was ultimately paid; and, equally important, to
17 help push this case to go effective as expeditiously as
18 possible.

19 Mr. Polkowitz was selected as the admin expense
20 claim representative on March 13th, so roughly about 10
21 months ago. And as you heard earlier, in the short time and
22 through the hard work of Mr. Polkowitz, the UCC, and the
23 Debtors and others, many matters have been settled and two
24 significant distributions have been made to date to those
25 admin creditors who opted into the settlement program.

1 That said, Your Honor, it is not lost on us to
2 spend over a year now since the plan was confirmed and those
3 same admin creditors have received less than 30 percent of
4 their allowed admin claim. And, frankly, as you heard from
5 the Debtors themselves, it's unclear when and if another
6 distribution is forthcoming and when and if this plan will
7 go effective.

8 That said, we are optimistic about the plan going
9 effective. We do think it's going to create -- it's going
10 to require creative hard work on the part of everybody
11 involved. We continue to work closely with the Debtors and
12 the UCC and many admin creditors have reached out to us
13 throughout this process.

14 But this is why this is so important. Like any
15 claim, seeking a priority status like what is being sought
16 here, this application of Pearl that's before the Court
17 needs to be carefully scrutinized.

18 As noted in the objection in both of the joinders
19 as well as the oral arguments and comments that the Court
20 made today, Mr. Polkowitz does not believe that Pearl has
21 met its burden to satisfy the stringent standard for relief
22 being sought. And, in fact, we think the record
23 demonstrates that Pearl has failed to show that it has made
24 a direct substantial contribution to the Debtor's estate.
25 It would warrant it receiving a priority claim in the form

1 of a substantial contribution.

2 Your Honor, on a personal level, I'm very fond of
3 Mr. Wander and certainly the passion he's shown in this
4 case. I've gotten to know him quite well over the past year
5 and a half and I've been involved personally in the
6 negotiations with the Debtors, the UCC and many admin
7 creditors leading up to plan confirmation.

8 But when you read through the plan confirmation
9 transcript carefully and you look at his two declarations
10 that he filed, one for his application and one for his
11 reply, by his own admission, his client stopped being a
12 constructive part of a global solution almost a month before
13 plan confirmation.

14 And Pearl argued against both confirmation of the
15 plan and the Administrative Expense Claims Consent Program,
16 and that cost the estate significant dollars. Pearl was not
17 left at the altar while some backdoor deal was cut.

18 But, rather, Pearl and Mr. Wander consciously made
19 the decision to not engage in any meaningful settlement
20 discussion that they felt did not give Pearl a homerun type
21 scenario.

22 Well, nobody in this case got a homerun. In fact,
23 most everybody involved here left significant value on the
24 table and were forced to make concessions that they did not
25 want to make for the greater good of all the creditors in

1 this case. And maybe that's why it as a good settlement in
2 the end and ultimately the Court approved it, but the Court
3 only approved it after the Court added further value to the
4 program. It wasn't added by Pearl.

5 The ad hoc vendor group -- you asked the question
6 earlier about whether or not the ad hoc vendor group was
7 involved in the negotiations with Pearl and that we were
8 aware of the negotiations that were being made allegedly on
9 behalf of all the admin creditors. We were not.

10 The \$1 million, in our view, was done, when you
11 look at the transcript, at the urging of the Court. And
12 that extra \$1 million was a timing issue. There's no cap on
13 the amount of money that would be paid to the admin
14 creditors except for the 80 and 75 percent case that was
15 negotiated.

16 In other words, that \$20 million that became \$21
17 million was not a settlement amount, it was not a cap that
18 was ultimately going to be distributed; it was just how much
19 was going to be distributed in the first interim
20 distribution before there were subsequent distributions.
21 And as Mr. Singh pointed out, it is a timing issue because
22 it was ultimately distributed and would have bene in the
23 second distribution.

24 So, in sum, Your Honor, while the administrative
25 expense claims representative will continue to look at every

1 claim, as he has done so far, including any future
2 application for substantial contributions on a case-by-case
3 basis and, frankly, believes in certain circumstances
4 substantial contribution in this case may be warranted, he
5 does not feel that the facts in record before this Court
6 demonstrate that Pearl meets the stringent requirements of
7 Section 503(b)(3)(d) and 503(b)(4) of the Bankruptcy Code.
8 Pearl did not engage in extraordinary actions which led
9 directly to tangible benefits to the creditors, Debtors or
10 the estate. As such, we believe the Pearl application
11 should be denied.

12 Your Honor, I have nothing further to add but I'm
13 happy to answer any questions you might have.

14 THE COURT: No, that's fine, thanks.

15 MS. MORABITO: Thank you, Your Honor.

16 THE COURT: Okay, anyone else? All right. Mr.
17 Wander, do you have anything to say in reply or in response?

18 MR. WANDER: Yes, Your Honor, thank you. David
19 Wander of Davidoff Hutcher & Citron, counsel for Pearl
20 Global. Your Honor, the Debtor and Ms. Morabito just made
21 some statements on the record that are not in any papers and
22 so I'd like to address those comments and tell Your Honor
23 what really happened with the negotiations with my group and
24 why the Debtor stopped negotiating with me and my group.
25 And here's really the overview, and it really gets down to

1 world imports.

2 And what I'm going to touch on on this will also
3 address the comment by Mr. Singh about the Restructuring
4 Committee being a fiduciary and looking out for all
5 creditors including administrative creditors.

6 So, here's what happened. After the hearing on
7 the 503(b)(1) motion, I believe it was either April 21st or
8 May 21st, and that involved several other attorneys -- the
9 issue of World Imports was not before the Court because
10 that's 503(b)(9), as everyone knows, and we were litigating
11 503(b)(1) and goods that were ordered prepetition and
12 delivered post-petition.

13 And in the colloquy between Your Honor and
14 counsel, Your Honor made some comments about Your Honor's
15 view on the world import's decision. And Your Honor's
16 comments indicated that you looked favorably upon the lower
17 court decision that was reversed by the Third Circuit.

18 And so what happened after that is the Debtors --
19 and I believe with the Restructuring Committee -- they
20 decided that the best way they could address the
21 administrative insolvency issue was to attack the foreign
22 vendor claims on the World Imports issue and take a contrary
23 position. And that actually, I submit based upon my
24 discussions with the Debtor, and the committee, and the
25 meetings I attended, it was no secret that their way of

1 achieving an effective date was to object to all of the
2 World Import's vendors claims. And it was a significant
3 amount of money.

4 Now, the proposal that I had that I went over with
5 the committee and that then, when I met with the Debtor and
6 the committee and Foley Lardner, I made it clear that World
7 Imports was an issue that needed to be resolved. And that's
8 where the Foley group and my group, our interests were not
9 aligned.

10 Because the Foley group were, I believe, hedge
11 funds, claims traders that, you know -- people involved in
12 the large bankruptcies all know of Lightbox, and Hanes, and
13 Cherokee and they purchased non-foreign vendor trade claims.

14 So, for the Foley group, supporting the Debtor and
15 the committee's attack on the foreign vendors made sense to
16 them. What I was suggesting is why don't all administrative
17 creditors take a 25 percent haircut, agree to support the
18 plan going effective, even though the admins wouldn't be
19 paid 100 cents, and give them whatever cash is available?

20 And had that been done, the plan would've been
21 effective and you would've had a lot less litigation. But
22 it would've meant that the Debtors and the committee
23 would've had to give up on their attempts -- I think it was
24 like a 30 or \$40 million number that they thought they could
25 knock down on the administrative foreign vendors.

1 And that's why I was no longer given a seat at the
2 table, and I allude to this or I mention this, Judge, in
3 Footnote 2 of the reply by Pearl Global. What was good for
4 the Foley group was not necessarily good for other
5 administrative creditors, especially the foreign vendors.

6 So, that's why the Debtor, and committee, and the
7 Foley group teamed up. It was not because I couldn't bind
8 my group. Everybody knew that my group was different from
9 the Foley group. The Foley firm had been retained by the
10 Lightbox, Cherokee and Hanes. I believe they filed in 2019.
11 They're a formal group or committee, and they were being
12 paid by their client, presumably.

13 I had organized a group of foreign vendors and
14 some other administrative creditors, and many of them had
15 their counsel.

16 So, I want to be clear that that's why the
17 administrative foreign vendor group that I was representing
18 was no longer included. And that's how they went forward
19 with the plan.

20 Now, one of the things the cases state -- this is
21 in Bayou and the other cases when they talk about
22 substantial contribution -- one of the things they mention
23 is a creditor who objects to a plan so that a better plan
24 can be confirmed. And that is what happened here.

25 Pearl Global objected to the plan vigorously. And

1 I put on the record all of Pearl's objections. And Pearl's
2 objections were the objections by all of the nonprofessional
3 administrative creditors. Not enough cash was being paid to
4 the nonprofessionals. Not wasn't being paid to Pearl.
5 Because I took a position that a rising tide lifts all
6 boats. So, if I could do better for all of the
7 administrative creditors, that would help Pearl.

8 And so I argued to give more cash to the
9 administrative creditors. I said the non-opt out -- no, I
10 said, in the beginning, the consent plan would bind
11 creditors who didn't opt out. And I said a lot of them are
12 foreign vendors, they don't have lawyers. I don't know if I
13 mentioned that they may not speak English but probably
14 that's the case. And I made that point. And that
15 subsequently was changed.

16 And I'm not taking sole credit for the changes to
17 the plan. Your Honor identified some deficiencies in the
18 original settlement program. That was only announced two
19 days or a day and a half before the confirmation hearing.

20 So, I'm checking my notes, Your Honor. I just
21 want to make sure that I responded to the different points
22 and that was that Mr. Singh said I had no group that I could
23 bind; Ms. Morabito saying I was no longer involved in the
24 negotiations a few months before confirmation.

25 Actually, it was only about two weeks before the

1 confirmation hearing that things split up and the Foley
2 group then reached their construct.

3 I didn't support the Administrative Consent
4 Program and that was clear. But through my conduct at the
5 confirmation hearing, I submit, you ended up with, albeit a
6 flawed plan, it was a better plan. And I submit that this
7 timing issue and the tweaking, it's all a red herring.
8 Because the million dollars that I included out of purely
9 altruistic motives that while I was settling Pearl Global's
10 claim, I was still doing whatever I could for all the other
11 creditors. And that, to me, should satisfy the standard of
12 a substantial contribution of extraordinary effort.

13 Now, in preparing for today's hearing and going on
14 the docket, I saw that there's another fee application next
15 month when the professionals are going to be asking for, in
16 round numbers, Judge, another \$7 million.

17 So, one must wonder why all of this objection to a
18 \$215,000 fee request for someone who, in addition to
19 settling their client's claim, got a million dollars for all
20 the other creditors. They should be applauding what I did,
21 but for the fact I was a thorn in their side.

22 I objected to what they were doing. I've been
23 critical of their conduct. So, of course they're going to
24 object to my amazingly de minimis substantial fee
25 application. I mean, it's a rounding error on their fees.

1 And I submit that what I did in this case -- all
2 Pearl Global. And the record is clear that I was arguing,
3 advocating zealously for many months before confirmation and
4 during confirmation, not just for Pearl but for all of the -
5 -

6 THE COURT: All right, Mr. Wander, I think we're
7 going over old ground and I don't want to interrogate you
8 again as to your authority, so I think we should wrap this
9 up.

10 MR. WANDER: Your Honor, I just wrapped up.

11 THE COURT: Okay.

12 MR. WANDER: That was what I wanted to say, that I
13 advocated for all of the non-professional administrative
14 creditors. I think that was extraordinary conduct. The fee
15 application, the fee aspect is very reasonable, and I
16 submit, based on the record with the undisputed facts
17 basically, that the application should be granted.

18 THE COURT: Okay, all right. I have before me a
19 motion by Pearl Global Industries Ltd for allowance and
20 payment of a claim under Section 503(b)(3)(d) and 503(b)(4),
21 which provide that an administrative expense can include the
22 actual and necessary expenses on your three; it's other than
23 compensation or reimbursement specified in paragraph (4) of
24 the subsection.

25 Paragraph (4) refers to compensation for

1 professional services and reimbursement for professionals of
2 Section 503(b) incurred by, in subsection (d), a creditor,
3 which Pearl Global is, in making a substantial contribution
4 in a case under Chapter 11 of this title.

5 And then again, Section 503(b)(4) provides for the
6 reasonable compensation of professional services, for
7 professional services rendered by an attorney whose expense
8 is allowable under subparagraph (d) of paragraph (3) of this
9 subsection, based on the time, the nature, the extent of the
10 value of such services and the cost of comparable services
11 other than in a case under this title, and reimbursement of
12 actual necessary expenses incurred by such attorney or
13 accountant.

14 The case law under Section 503(b)(3) and (4) is,
15 in this district and in the Second Circuit generally, well
16 developed at this point. It's well discussed in a fairly
17 recent case by Judge Lord out of the Eastern District of New
18 York, In re. Hancock St., SML LLC, 2016 B.R. Lexis 3828
19 (Bankr. E.D.N.Y., Oct. 25, 2016).

20 There, Judge Lord notes, first, that a party
21 seeking administrative expense under -- or seeking allowance
22 and payment of administrative expenses under that section
23 must prove substantial contribution by a preponderance of
24 the evidence; that mere conclusory statements regarding
25 one's substantial contribution are insufficient for such

1 involvement to be deemed compensable under the section; and
2 that the circumstances entailing a party to a substantial
3 contribution expense are case specific, fact intensive, and
4 unusual. That's at page 19 of the decision.

5 She also states that courts in this circuit have
6 considered the following factors in determining whether a
7 party has made a substantial contribution under Section
8 503(b): one, whether the services benefited the estate
9 itself or all of the parties in the bankruptcy case; two,
10 whether the service resulted in a direct, significant, and
11 demonstratively positive benefit for the estate, and I will
12 add that most other courts have added the word net between
13 positive and benefit, i.e., positive net benefit for the
14 estate; and three, whether the services duplicated the
15 efforts of others, citing Bedford JV, LLC v. Sky Lofts, LLC,
16 2013 U.S. District Lexis 125965 (E.D.N.Y., Sept. 3, 2013).

17 She further notes, and this is consistent with the
18 case law including the cases that she cites, the substantial
19 contribution must be more than an incidental one arising
20 from activities the applicant has pursued in protecting his
21 or her own interest, citing In re. Dana Corp., 390 B.R. 100,
22 108 (Bankr. S.D.N.Y. 2008). She goes further, again citing
23 the Dana case, to say creditors are presumed to act in their
24 own interest and thus, face an especially difficult burden
25 in meeting the substantial contribution test,

1 notwithstanding the fact that mere self-interest in and of
2 itself does not preclude reimbursement.

3 Nevertheless, as she notes correctly, compensation
4 under Section 503 is, quote, "rare" close quote, and
5 requires, quote, "extraordinary circumstances when the
6 creditors involvement truly enhances the administration of
7 the estate," closed quote. See also the cases cited for
8 that proposition in the opinion which carries over to page
9 20.

10 In light of all of those requirements, Judge Lord
11 notes further, cases finding that a creditor made a
12 substantial contribution generally involve a creditor
13 playing a leadership role that would normally be expected of
14 an estate compensated professional. This includes
15 activities such as active facilitation and negotiation of a
16 confirmed plan or efforts to impose a plan -- or oppose a
17 plan that resulted in a more favorable one.

18 In that decision, the movant who represented a
19 creditor in the case like the movant here, alleged in that
20 his legal services in being involved in negotiation of a
21 confirmed plan and opposing the original plan that was filed
22 in support of a more favorable one warranted the admission -
23 - I'm sorry -- the allowance of a substantial contribution
24 claim.

25 Consistent with most cases that deny substantial

1 contribution claims under similar facts -- in fact, frankly,
2 I think all cases -- where the movant was not the proponent
3 or draftsman or a prime mover with respect to a plan or
4 the objections to a plan in which its objections resume
5 after adopted largely wholesale in the new plan. Judge Lord
6 in the Hancock case found to the contrary, that the movant
7 had not done enough to warrant a substantial contribution
8 allowance. See also In re. Westinghouse Electric Co., LLC,
9 2019 B.R. Lexis 2981 (Bankr. S.D.N.Y. Sept. 19, 2019).

10 The decision in In re. Bayou Group, LLC, 431 B.R.
11 549 (Bankr. S.D.N.Y. 2010) echoes substantially all of the
12 foregoing standards. In that case, I note that certain
13 aspects of the term "substantial contribution" are well
14 recognized, i.e., that it is factual with the movant bearing
15 the burden by the preponderance of the evidence.

16 Moreover, that provisions establishing
17 administrative expenses should be construed narrowly and
18 administrative expenses kept to a minimum, citing among
19 other cases, In re. United States Lines, Inc., 103 B.R. 427,
20 429 (Bankr. S.D.N.Y. 1989), and Dana Corp. at 390 B.R. 108.

21 And then in the Bayou case, I went on to hold, or
22 state rather, at page 560: "Accordingly, the integrity of
23 Section 503(b) can only be maintained by strictly limiting
24 compensation to extraordinary creditor actions which lead
25 directly to tangible benefits to the creditors, debtor or

1 estate," citing among other case, In re. Best Products Co.,
2 Inc., 173 B.R. 862, 866 (Bankr. S.D.N.Y. 1994) and In re.
3 Granite Partners, 213 B.R. 440, 445 (Bankr. S.D.N.Y. 1997).

4 The Bayou case goes on to state at page 561: "The
5 problem with all of these synonyms, i.e., concrete benefit,
6 direct significant, and demonstrative positive benefit, and
7 a contribution of this considerable in amount value or work,
8 in each case of debtor's estate, the creditors and, to the
9 extent relevant, the stockholders, is that they do little to
10 shed any real light on how to apply the direct benefit rule
11 in practice."

12 The decision goes on to note, however, that the
13 case law has narrowed the imprecision arising from the
14 statute's language to qualify the direct benefit must be a
15 substantial net benefit. A direct benefit also cannot be
16 established merely by a movant's extensive participation in
17 the case or be based on services that duplicated those of
18 professionals already compensated by the estate, such as
19 counsel for the debtor or an official committee.

20 And again, as Judge Lord noted, the creditors face
21 an especially difficult burden in passing the substantial
22 contribution test since they are presumed to act primarily
23 for their own interests, and efforts undertaken by creditors
24 solely to further their own self-interests are not
25 compensable under Section 503(b), and services calculated

1 primarily to benefit the client do not justify an award,
2 even if they also confer an indirect benefit on the estate.

3 In light of all of the foregoing, Bayou also notes
4 at page 561 that it is -- 503(b) awards are reserved for
5 those rare and extraordinary circumstances where the
6 creditors involvement truly enhances the administration of
7 the estate. So I think again, Dana Corp., as well as two
8 other cases from the Southern District of New York.

9 The opinion goes on to state: Thus, Section
10 503(b)(3)(d) and (b)(4) may not be used to buy off a pest
11 who did little, if anything, to advance, and in fact may
12 have impeded, the proper administration of the case, such as
13 where it is alleged that a settlement benefited not only the
14 creditor, but also others similarly situated, or where the
15 creditor, as was the case in Best Products Company, or the
16 creditor group was throughout the case merely an advocate
17 for its position on some issues of which it prevailed, on
18 some it didn't, but in all of the cases was looking after
19 its own interests.

20 In sum, again consistent with Judge Lord's opinion
21 in the Hancock St. case, Bayou states, "The majority of
22 cases allowing creditors substantial contribution claims
23 under Sections 503(b)(3)(d) and (b)(4) have therefore found
24 that the creditor played a leadership role that normally
25 would be expected of an estate compensated professional but

1 was not so performed."

2 Most have, consistent with pre-bankruptcy code
3 practice, involved a creditor who actively facilitated the
4 negotiation and successful confirmation of the Chapter 11
5 plan or in opposing a plan brought about the confirmation of
6 a more favorable one. And even in other contexts, the
7 movant has performed functions that normally would have been
8 undertaken by estate compensated professionals when it had
9 to be performed because estate compensated professionals
10 were not doing their jobs.

11 In the Bayou case, I awarded a substantial
12 contribution claim for creditors who clearly acted on behalf
13 of all creditors in the case and performed an important
14 administrative role, where the debtor was, in essence, non-
15 existent because it had engaged in fraud and, therefore, the
16 movants assumed the mantle of, in large measure, the
17 professionals for the debtor in moving forward with the
18 plan.

19 As counsel for the debtors here have observed, a
20 contrary fact pattern appeared at In re. Best Products Co.,
21 Inc., 173 B.R. at 866, where the Court found that the mere
22 participation in a case which resulted in some results that
23 could arguably be viewed as favorable not only to the
24 creditors who made the motion, but parties-in-interest was
25 insufficient to warrant a substantial contribution award,

1 given all of the foregoing requirements.

2 A similar point is made in In re. Brooke Corp., B-
3 R-O-O-K-E, 433 B.R. 856, 873 (Bankr. D. Kansas, Jan. 5,
4 2011), in contrasting the facts set forth in that case from
5 the facts in the Bayou case, and noting that in Bayou, the
6 committee expressly took upon itself the representation of
7 all the debtors' creditors. In these cases, the movant
8 represented only two of the banks who held Brooke's
9 securitizations. See also with regard to the general
10 standard, as well as how it is applied, In re. AMR Corp.,
11 2014 B.R. Lexis 3298 at pages 6 through 10, (Bankr. S.D.N.Y.
12 Aug. 4, 2014).

13 Here, it is clear to me, and frankly not even a
14 close call, that the movant has not carried its burden to
15 show an entitlement to allowance of a substantial
16 contribution claim under Sections 503(b)(3)(d) and (4).

17 It is asserted in the motion and supporting
18 affidavit, as well as the reply and reply affidavit, that
19 counsel for the movant organized an ad hoc group of
20 similarly situated administrative expense claimants and, for
21 their benefit, acted in these Chapter 11 cases to represent
22 the interests of the group in negotiations and thereafter in
23 objecting to the debtors' proposed Chapter 11 plan, which
24 included in it a proposed global administrative expense
25 claim procedure, and then negotiated a settlement thereafter

1 which modified that procedure in three respects, and in each
2 case, which the movant contends, provided a substantial
3 direct benefit for purposes of Section 503(b)(3)(d) and
4 (b)(4).

5 There are several problems with this argument.
6 First, the claimed benefit, or the benefit that is claimed
7 to have been conferred by the movant was not to all
8 creditors or to the debtors' estates in general or, frankly,
9 to the administration of the case and the case law and the
10 statute's own reference to the administration of the case
11 generally requires.

12 Instead, the claimed benefit was to a subset of
13 the administrative expense claimants in the case, namely
14 certain unidentified foreign vendors among or perhaps all of
15 the foreign vendors that had submitted administrative
16 expense claims in the case.

17 Moreover, it appears clear to me that the asserted
18 or the claimed benefit conferred was not substantial and
19 direct by any means or the result of the movant's efforts.
20 Three claimed benefits conferred are asserted: first, the
21 settlement negotiated on behalf of Pearl Global, in addition
22 to fixing Pearl Global's administrative expense claim and
23 its preference exposure under Section 547 of the Bankruptcy
24 Code provided for an increase by \$1 million of the amount to
25 be paid in the initial distribution to administrative

1 expense creditors who opted in to the administrative expense
2 claims settlement, a settlement that the claimant Pearl
3 Global had originally opposed but accepted as part of its
4 own settlement.

5 It is clear to me from the record in this case
6 that under the terms of the plan and the administrative
7 expense claims resolution settlement, that that extra \$1
8 million would have been paid in not the first but the second
9 distribution, which was made approximately eight months
10 later under the administrative expense settlement negotiated
11 not by Pearl Global by its counsel, but instead by the ad
12 hoc committee of administrative expense creditors
13 represented by Foley & Lardner.

14 So the benefit to their debt was claimed here is
15 merely a benefit of an acceleration of \$1 million payment by
16 eight months, the interest on which is considerably less
17 than, at any reasonable rate, the amount of the
18 administrative expense claim asserted here, which is in
19 excess of \$217,000.

20 It is additionally alleged that Pearl Global and
21 its counsel had a direct role and the Court's having the
22 escrow for professional fees under the cash collateral and
23 DIP order reduced by \$9 million, with that amount of money
24 instead being put into general funds for the performance of
25 the administrative expense program.

1 It is clear to me from my recollections of the
2 confirmation hearing, as well as my review of the transcript
3 of that hearing, that, in fact, in keeping with my duties
4 under Section 1129(a) of the Bankruptcy Code, and more
5 specifically 1129(a)(9)(A) and 1129(a)(11), that for the
6 plan to satisfy the confirmation requirements, based on the
7 entire record for me, very little of which, if any, was
8 developed by Pearl Global, the plan required that amount of
9 money to go into general funds up front before I would enter
10 the order confirming the plan, albeit that the escrow was
11 one that is adjustable in the first place and would become
12 available later in any event.

13 A similar observation can be made with respect to
14 the third and last claimed benefit to have been conferred by
15 Pearl Global and its counsel, which was an increase in the
16 percentage distribution on account of administrative expense
17 claims under the administrative expense program in the plan
18 for so-called non-optout administrative expense creditors,
19 that is creditors who neither opted in to the administrative
20 expense program or affirmatively opted out of it. This was,
21 therefore, a third group or a third subclass of
22 administrative expense creditors. Originally, they would
23 receive the same 75 percent that the opt-in group received.

24 Simply based on my review of the plan and cases
25 where there were similar programs, such as the Toys 'R Us

1 plan, I did not see a logical basis for the same percentage
2 treatment or same percentage cap for those who opted in and
3 those who did nothing. As a result of my comments at the
4 confirmation hearing, the cap for the non-optout class was
5 raised to 80 percent.

6 Again, I conclude based on the fact specific
7 analysis that is required that the actual and demonstrable
8 benefit to the debtors' estate, creditors -- and, of course,
9 not here -- but to the extent relevant, stockholders, and
10 that benefit being a substantial net benefit directly
11 attributable to Pearl Global and its counsels' actions
12 simply is not going to establish with regard to any of the
13 three claimed benefits provided here, even if I were to
14 conclude that a benefit to a subset of a class of
15 administrative expense creditors would satisfy the statute.

16 I will note that Pearl Global actually negotiated
17 the \$1 million distribution as the advance distribution for
18 a subset of the subset, i.e., those who opted in to the
19 settlement, so it is even a more narrowly tailored benefit
20 and, therefore, even more remote from the type of benefit
21 that the case law and I believe congress contemplated in
22 these two sections of the Bankruptcy Code.

23 I think it's also important to note the context of
24 Pearl Global's efforts in this case, as asserted by it, to
25 be compensable under Section 503(b)(3)(d) and (b)(4). Under

1 Section 1129(9)(a) of the Bankruptcy Code, unless an
2 administrative expense creditor consents to a different
3 treatment, the plan must pay all administrative expense
4 claims in full on the effective date. That means that any
5 administrative expense creditor with a material claim has
6 considerable leverage over the confirmation process, i.e.,
7 it must be paid in full unless it agrees otherwise. Each
8 creditor, therefore, has its own mini-veto over confirmation
9 if it appears that the debtor may not be able, under
10 reasonable projections, to pay all allowable administrative
11 expense claims in full on confirmation.

12 Counsel for Pearl Global noted during oral
13 argument that he viewed a rising tide lifts all boats and,
14 therefore, he was effectively negotiating for all
15 administrative expense creditors when seeking more money
16 from the debtor than was set forth in the administrative
17 claims process or procedure.

18 But, of course, at the same time since the debtor
19 cannot discriminate unless the creditor consents to such
20 discrimination under 1129(9)(a), raising the interests of
21 all creditors is, in fact, raising one's own interest in
22 this context and, in fact, increasing arguably the leverage
23 that one has, which to me means that the high burden to show
24 that Pearl Global was actually acting in the interests of
25 all creditors or even a subset of all creditors has not been

1 carried here.

2 Finally, the record is clear that Pearl Vision
3 (sic) really was not acting formally for all creditors; it
4 did not assume that mantle. It never represented anyone, or
5 its counsel never represented anyone more than it and the
6 other three creditors that it appeared on behalf of,
7 including, as stated in the transcript of the confirmation
8 hearing. Indeed, other parties to this so-called group that
9 it organized appeared by their own counsel at the
10 confirmation hearing and continued to oppose confirmation
11 even after Pearl Vision (sic) settled.

12 It is clear for me that it did not have any
13 ability to bind any other creditor. There's no formal
14 organizational documents referred to for the so-called ad
15 hoc group, Pearl Global did not speak for the so-called ad
16 hoc group, its counsel did not file the statement required
17 to be filed when representing such a group under Bankruptcy
18 Rule 2019, and it was not acting as a fiduciary for any of
19 those parties, not did it actually engage in negotiations in
20 which it kept any of those parties informed with respect to
21 the negotiations that led to its actual settlement, i.e.,
22 between the October 3 hearing and the adjourned confirmation
23 hearing that resumed on October 7.

24 It simply did not play the leadership role in
25 these cases that is generally required by the case law, nor

1 did it provide any contribution to the overall estate in
2 those rare cases, such as the McLean Industries case that I
3 previously cited, will at times justify an award under
4 Section 503(b)(1). In other words, notwithstanding the
5 references repeatedly to its group or my group, there was no
6 such group that could have served as the fulcrum point for
7 negotiations, in contrast to the group represented by Foley
8 & Lardner and actually acting as a group.

9 So taking into account all of the foregoing and
10 recognizing that there's no direct significant and
11 demonstrable benefit to the estate, that the benefit exceeds
12 the costs of either the award itself or the costs to the
13 estate of getting the asserted benefit, that the party acted
14 primarily for its own benefit and not for the benefit of all
15 parties in the case or the estate or even to further the
16 administration of the case by furthering a global settlement
17 that would clearly bind all parties or at least form a
18 framework for binding all parties, and that it does not
19 appear to me that Pearl Global did all of this except on its
20 own behalf and, therefore, did not have and would not have
21 done this unless it had an expectation of reimbursement by
22 the estate, I conclude that the motion should be denied.

23 In addition to all the case law I've cited, those
24 factors all come out of the discussion of this section
25 generally in "Collier on Bankruptcy" at paragraphs 4301[5] -

1 - that's brackets 5, bracket [a] bracket, and bracket [b]
2 bracket 16th Edition 2021.

3 Now, I should be clear, although I think this is
4 implicit, I am dealing solely with the right to a
5 substantial contribution claim under Section 503(b). I am
6 not making any comment on the quality of Davidoff Hutcher &
7 Citron's work on behalf of its clients, Pearl Global and
8 others in these cases. I am assuming that it has been paid
9 by them and that they are happy with its work because they
10 obtained a settlement that they agreed to. But that is not
11 -- doing good work in a case, in other words, is not a basis
12 for charging the debtors' estate for that work.

13 Chapter 11 is a multiparty process. I assume that
14 most law firms and lawyers who appear in Chapter 11 cases
15 will be doing good work for their clients, and that includes
16 taking actions that may result in improvements in the case
17 for not only their clients, but other clients, as well as at
18 times taking actions where they are ruled against.

19 But the standard here is far higher than that type
20 of work because in general, it's an extraordinary thing to
21 award a creditor or a firm administrative expense allowance
22 under Sections 503(b)(3)(d) and (4).

23 So I'll ask the debtors' counsel to submit an
24 order denying the motion. You don't have to formally settle
25 it on Mr. Wander, but you should copy him, as well as

1 counsel for the administrative expense claims representative
2 and the committee when you email it to chambers.

3 MR. SINGH: Thank you, Your Honor. We will do so.

4 THE COURT: Okay. I think that concludes the
5 agenda for today.

6 MR. SINGH: That's right, Your Honor, that's all
7 we have on. I did want to just go back and answer your -- I
8 did get an answer on your open question from the status
9 report regarding the other expense line item. I did get an
10 email from Mr. Murphy.

11 Your Honor, a couple of things go into this
12 category. One sort of relates to remaining real estate that
13 Sears continues to own, so insurance, real estate taxes and
14 the like.

15 There's also outstanding OCP costs that were
16 incurred during the case that still haven't been paid and
17 other sort of non- -- sort of estate retained, formally
18 retained professionals that were either ordinary course or,
19 you know, vendors and the like that continue to have some
20 obligations.

21 We've also got reserves or estimated amounts for
22 the administrative claims representative and its counsel,
23 and there's some vendor A/P remaining for the systems that,
24 you know, the estate continues to use, so that's a combined
25 line item for those various ongoing costs.

1 And again, it's projected out for a year only if
2 we go that long, but it's not -- just to show you what it
3 would be. But obviously, if the case ends sooner, the
4 number would go down.

5 THE COURT: Okay. All right, thank you. Okay,
6 very well. I'll conclude the hearing then and hang up.
7 Thanks, everyone.

8 MR. SINGH: Thank you, Your Honor.

9 (Whereupon these proceedings were concluded at
10 12:16 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya Ledanski
Hyde

Digitally signed by Sonya Ledanski Hyde
DN: cn=Sonya Ledanski Hyde, o, ou,
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Date: January 25, 2021

[& - 6.8.]

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